foresee all the results and consequences that may follow from enforcing this law in any given case. It is quite certain that the witness is compelled to testify against himself. Can any court be certain that a sure and sufficient substitute for the constitutional immunity has been supplied by this act; and if there be room for reasonable doubt, is not the conclusion obvious and a necessary one?" The presence of dissenting opinions in nearly all these cases, in the face of the doctrine of *stare decisis,* seems to indicate that plain logic is not wholly on the prevailing side of the question.

CONSTITUTIONALITY OF MUNICIPAL REGULATION OF MILK BUSINESS.

The sanitary code of the city of New York confers discretionary power upon an administrative board to grant or withhold permission to sell milk within the city. It is held in *People ex rel. Lieberman v. Van de Car,* 26 Sup. Ct. 144, that this is a proper subject for regulation within the police power of the state and, in the absence of any showing of arbitrary or oppressive exercise of such power, it will not be considered violative of the right to due process of law guaranteed by the Fourteenth Amendment of the Federal Constitution. It is further held that it is not denying the equal protection of the laws guaranteed by the Constitution to single out the milk business so long as all dealers in the city are equally affected by such regulation. Equal protection of the laws is secured so long as the principle of equality is preserved among all those engaged in the business. *Powell v. Pennsylvania,* 127 U. S. 678; *Mo. Pac. Ry. Co. v. Humes,* 115 U. S. 512.

Dealing in milk in a large city is manifestly such an occupation as necessitates most careful regulation. Wholesome milk should be insured to the people who are practically helpless to protect themselves. It is proper for the legislature to delegate this power to a muncipal board, investing them with power to pass ordinances not only restricting and conditioning its supply and the manner of transporting and keeping it but also licensing its sale. *City of Newton v. Joyce,* 166 Mass. 83; *Gundling v. Chicago,* 177 U. S. 183; *New Orleans v. Faber,* 105 La. 208.

A sort of absolute control over persons and property in order that the health of the community may be secured is one of the fundamental necessities of government and has from very early times been vested in a board or in officers, who are not bound to wait for the slow course of justice but have power to take summary jurisdiction. In such matters a due process of law is simply a correct and orderly proceeding observing all the securities for pri-

vate right applicable to the particular case. A jury is inappropriate and has never been used in this class of cases. "Different principles are applicable in different cases and require different forms and proceedings; in some they must be judicial, in others the government may interfere directly, and *ex parte.*" *Story on Const.* (4th ed.) sec. 1943; *Cooley's Const. Law,* 241. The right to a particular remedy is not a vested right. *Walker v. Sauvinet,* 92 U. S. 90; *Ex parte Wall,* 107 U. S. 265.

In the light of recent history it may appear that the people may be called upon to suffer many outrages at the hands of the average municipal board in which such arbitrary power is vested, but on the other hand we must consider the absolute necessities of the case and let our hopes follow the presumption that a public officer will do his duty. It is on this ground that this and like ordinances are attacked. Officers may act arbitrarily and in disregard to their duty, licensing one person and refusing another similarly situated, giving great chance for monopoly and blackmail and thereby denying equal protection of the laws and due process of law. But public officials are presumed to do their duty and where the grievance is not in fact, the law is to be judged not by what may be done thereunder in disregard of duty but what may be lawfully done thereunder. *Jacobson v. Massachusetts,* 197 U. S. 11.

In this case compulsory vaccination was required by an ordinance framed in such broad terms that it might compel a person to submit when his physical condition would make the operation dangerous to life. It was held that while in this supposed case the authority might not be sustained, yet the complainant, being of sound body, offered no case for constitutional protection. There may be a public monopoly granted by law if for public reasons and if the public is served impartially. *Slaughter House Cases,* 16 Wall. 36. Where ordinances giving power to license one and refuse another similarly situated have been brought before the court on an actual grievance they have been held unconstitutional. *Chicago v. Netcher,* 183 Ill. 108; *Noel v. People,* 187 Ill. 587.

It is often argued that milk vending is one of the ordinary vocations of life, which anyone has a right to enter, and though he may be punished for not conforming to reasonable rules regulating the business he cannot be restrained from engaging in it altogether. But the police power may be lawfully resorted to for the preservation of health, even when it involves the summary destruction of property or deprivation of individual rights, and what is necessary is largely in the discretion of the legislature. *Lawton v. Steele,* 152 U. S. 133; *Dunn v. Burleigh,* 62 Me. 24.

Whether the determinations of the board are judicial and reviewable by mandamus or certiorari proceedings, or whether relief can be had solely through the removal of the board, are questions suggested in the case but not answered.

"FORMER JEOPARDY" AS APPLIED IN THE PHILIPPINES.

The Supreme Court of the United States has again shown the facility with which it can dodge a former decision in order to attain justice; for the decision in *Trono et al. v. U. S.*, 26 Sup. Ct. 121, is not entirely in harmony with those in *Mendezona v. U. S.*, 195 U. S. 185, and *Kepner v. U. S.** 195 U. S. 100. In the last mentioned case the plaintiff in error had been acquitted of the crime charged against him in the court of first instance, the government appealed and the higher court reversed the judgment of acquittal and found Kepner guilty of the crime of which the court of first instance had acquitted him. Upon a writ of error the Supreme Court of the United States held that the accused had been twice in jeopardy for the same offense and therefore reversed the decree of the supreme court of the islands and discharged Kepner. It was also there held that the government had no power to obtain a review of a judgment or decision acquitting an accused party, and if the court had based its decision squarely upon this point it would not have laid itself open to the remark made at the beginning of this comment, a remark which I do not make upon my own responsibility, but which I take from the opinion of a majority of the Supreme Court itself; for four of its number, including the Chief Justice, dissented from the Trono decision, and a fifth, Mr. Justice Holmes, concurred in the result only, presumably, upon the same grounds that he dissented from the Kepner decision, thus clearly showing that he thinks the two decisions inconsistent. Hence five of the Supreme Court Bench are of the opinion that the decision in the Trono case is inconsistent with the decision in the Kepner case. In the Trono case, a man indicted for murder was convicted of assault in the lower court and himself appealed to the supreme court of the islands. They reversed the decision of the court below and convicted him of murder in the second degree. The Supreme Court of the United States sustains that decision, saying: "The difference is vital between an attempt by the government to review the verdict or decision of acquittal in a court of first instance and the action of the accused person in himself

* For comment, see YALE LAW JOURNAL, Vol. XIV. page 43.